U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will reject the appeal as untimely. If the appeal had been timely, the AAO would have dismissed the appeal on the merits.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a math teacher. At the time she filed the petition, the petitioner taught at [redacted], a public school in [redacted] Maryland. USCIS records indicate that the petitioner now works for [redacted] Virginia. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

In order to properly file an appeal, the United States Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.8(b).

The director denied the petition on December 11, 2012. The petitioner, through counsel, attempted to file the appeal on December 28, 2012. The filing included a misdated check. A benefit request which is not signed and submitted with the correct fee(s) will be rejected. 8 C.F.R. § 103.2(b)(7)(1). The regulation at 8 C.F.R. § 103.2(b)(7)(ii) allows a petitioner or applicant to remedy certain fee deficiencies "within 14 calendar days." The director rejected the appeal in a notice dated December 31, 2012, because "[t]he date on the check/money order [the petitioner] submitted is not current." Counsel submitted a new check with a cover letter dated January 17, 2012; USCIS received the appeal with fee on January 22, 22 calendar days after the December 31, 2012 notice.

The petitioner did not timely file an appeal with the proper fee, and therefore the above regulations require rejection of the appeal. Even if the petitioner had timely filed the appeal, the AAO would have dismissed the appeal for the reasons explained below.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer –
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> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's

subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on December 27, 2011. In an accompanying statement, counsel stated:

> [The petitioner's] petition for waiver of the labor certification is premised on her Masters Degree in Mathematics with a solid 36 Doctorate credit [hours] obtained, over fifteen (15) years of dedicated and progressive teaching experience exclusively in Mathematics . . . , the awards and recognition received by her, among others.

Academic degrees, experience and institutional recognition (such as awards) are all elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B) and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. Particularly significant awards may serve as evidence of the petitioner's impact and influence on her field, but the petitioner did not demonstrate the significance of the awards documented in the record. Most of the awards are certificates that she received in conjunction with training teams in regional or district math competitions. Her school also named her "Teacher of the Year" in 2009 an honor that received coverage in the [redacted] a newspaper for [redacted] in the United States. The [redacted] article indicated: "There are now over 600 [redacted] teachers spread out in almost 200 [redacted] public schools."

Counsel asserted that the petitioner should receive the waiver because she is "capable of helping the nation improve the education of children in Mathematics which has been determined to be of great importance by the Federal and State Governments." Counsel did not identify any specific improvements attributable to the petitioner.

Counsel stated that the record contains a "Letter[] of Recognition . . . From Ms. [redacted]" The letter, dated May 3, 2011, reflected on the 2010-2011 school year, and contained no specific information about the petitioner.

The petitioner submitted witness letters from faculty, administrators, and students at various schools where the petitioner has taught, as well as one of her former college professors. These letters praised

the petitioner's abilities as an educator, but did not indicate that the petitioner's work has had, or will continue to have an impact outside of the classrooms and local school systems that have employed her. Other witnesses praised the petitioner's personal character.

signed a "Certification" indicating that the petitioner "is a bonifide [*sic*] author of She is one of the authors of Textbook. (Published in the Year ." The record contains no other information about the textbook.

The director issued a request for evidence on June 27, 2012, stating: "the evidence submitted failed to establish that [the petitioner's] contributions influenced her field as a whole." The director instructed the petitioner to "submit evidence that the beneficiary's contributions will impart national-level benefits."

Much of the petitioner's response to the request for evidence concerned the intrinsic merit of mathematics education, which does not distinguish the petitioner from others in the same field. Current law creates no blanket waiver for math teachers, and therefore general assertions about the value of the profession cannot establish eligibility for the waiver. Other materials stressed the need for education reforms, but did not show what role, if any, the petitioner has played in implementing such reforms.

Counsel stated:

> Since a 'National Mathematics Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
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> Even the curricula used by each state education department in the United States vary from each other.
>
> In other words, since not all NIW cases are based on prevailing Acts of United States Congress, it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope.

Counsel contended that the No Child Left Behind Act (NCLBA) and other legislation and policy initiatives establish that Congress and the executive branch have put special emphasis on education, especially in math and related subject areas. All employment-based immigrant classifications are based on "Acts of United States Congress," as is the statutory job offer requirement. There is no basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Counsel stated that the petitioner "has established her influence in the field of Mathematics based on numerous awards, honors and distinctions which cannot just be ignored." Counsel then listed many of the exhibits previously submitted with the initial filing of the petition. Simply identifying these exhibits, however, does not establish the petitioner's "influence in the field of Mathematics." The authorship of a math textbook, or parts thereof, can potentially have national impact, but the record contains insufficient information to establish the impact or influence of the petitioner's work on the textbook identified above. Furthermore, the book appeared before the petitioner arrived in the United States. The record does not show that the petitioner has written for any textbooks in the United States, or that any publisher has sought her contributions in that regard. Her involvement in a single publishing project several years ago does not establish that the petitioner will continue making similar contributions in the future.

The director denied the petition on December 11, 2012. The director stated:

> There is no question that the petitioner is a highly qualified math teacher. The petitioner established herself as an outstanding teacher and mentor. She is well liked by her superiors, peers and students. Her community involvement has helped her local community. However, evidence submitted failed to establish that her achievements had some degree of influence in her field as a whole. . . .
>
> The petitioner's assertions regarding the overall importance of an alien's area of expertise cannot suffice.

Counsel states that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claims that "the NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public middle school education sector." Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Contrary to counsel's assertion that the NCLBA modified or superseded *NYSDOT*, that legislation did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative change.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel contends that the labor certification process cannot meet the nation's needs because school teachers "require only a bachelor's degree," and therefore labor certification "would not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." Section 9101(23) of the NCLBA, 20 U.S.C. § 7801(23), defines the term "highly qualified" in reference to teachers. Sections 9101(23)(B) and (C) of the NCLBA require that a "highly qualified" teacher "holds at least a bachelor's degree." Because the NCLBA defines a teacher with a bachelor's degree as "highly qualified" (provided the teacher meets other specified requirements), the labor certification process does not thwart the NCLBA by setting the minimum degree requirement at a bachelor's degree rather than a master's degree.

While asserting that the NCLBA virtually mandates approval of the waiver, counsel cites a 2010 Department of Education report, *ESEA Blueprint for Reform*,[1] and acknowledges:

> The U.S. Department of Education's finding that meeting the NCLB Act's requirements for the "highly qualified" standard "does not predict or ensure that a teacher will be successful at increasing student learning" because while the NCLB requirements set minimum standards for entry into teaching of core academic subjects, they have not driven strong improvements in what matters most: the effectiveness of teachers in raising student achievement which demonstrates that teacher effectiveness contributes more to improving student academic outcomes than any other school characteristic.

[1] The quoted portion is available online at http://www2.ed.gov/policy/elsec/leg/blueprint/great-teachers-great-leaders.pdf (printout added to the record May 9, 2013).

The cited report does not support counsel's key contention, which is that the employment of "highly qualified teachers" as defined in the NCLBA will "clos[e] the achievement gap."

Counsel states that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements, and the record does not show that the petitioner's work has brought Baltimore's schools closer to meeting the NCLBA's achievement requirements.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is rejected.